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Supreme Court of the United States

October Term 1942

No. 1017

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libellants-Appellees),

against

AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

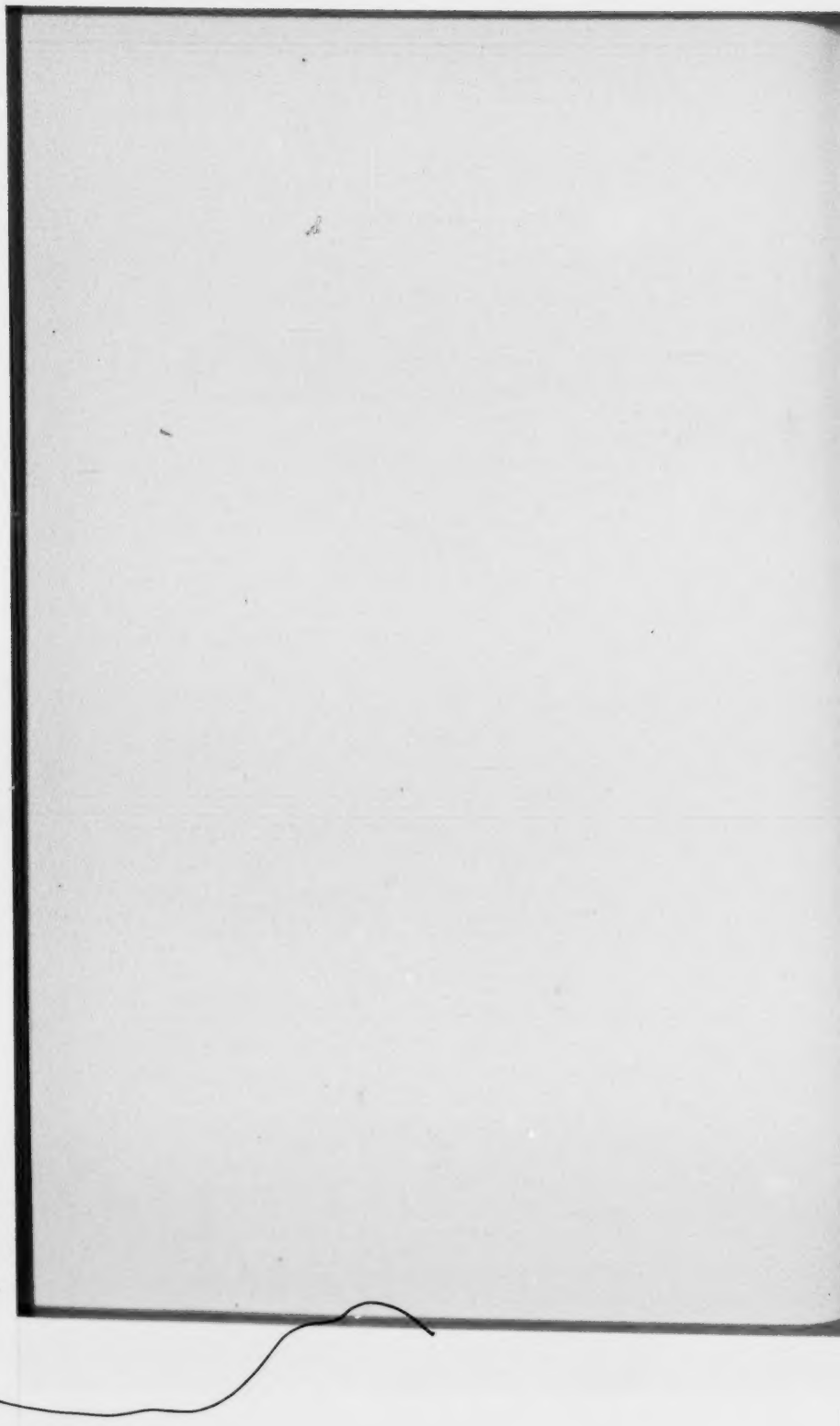
Respondents-(Respondents-Appellants).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CHARLES RECHT,
Counsel for Petitioners,
10 East 40th Street,
New York, N. Y.

BURLINGHAM, VEEDER, CLARK & HUPPER,
JOHN L. GALEY,
New York, N. Y.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,
Seattle, Wash.
of Counsel.



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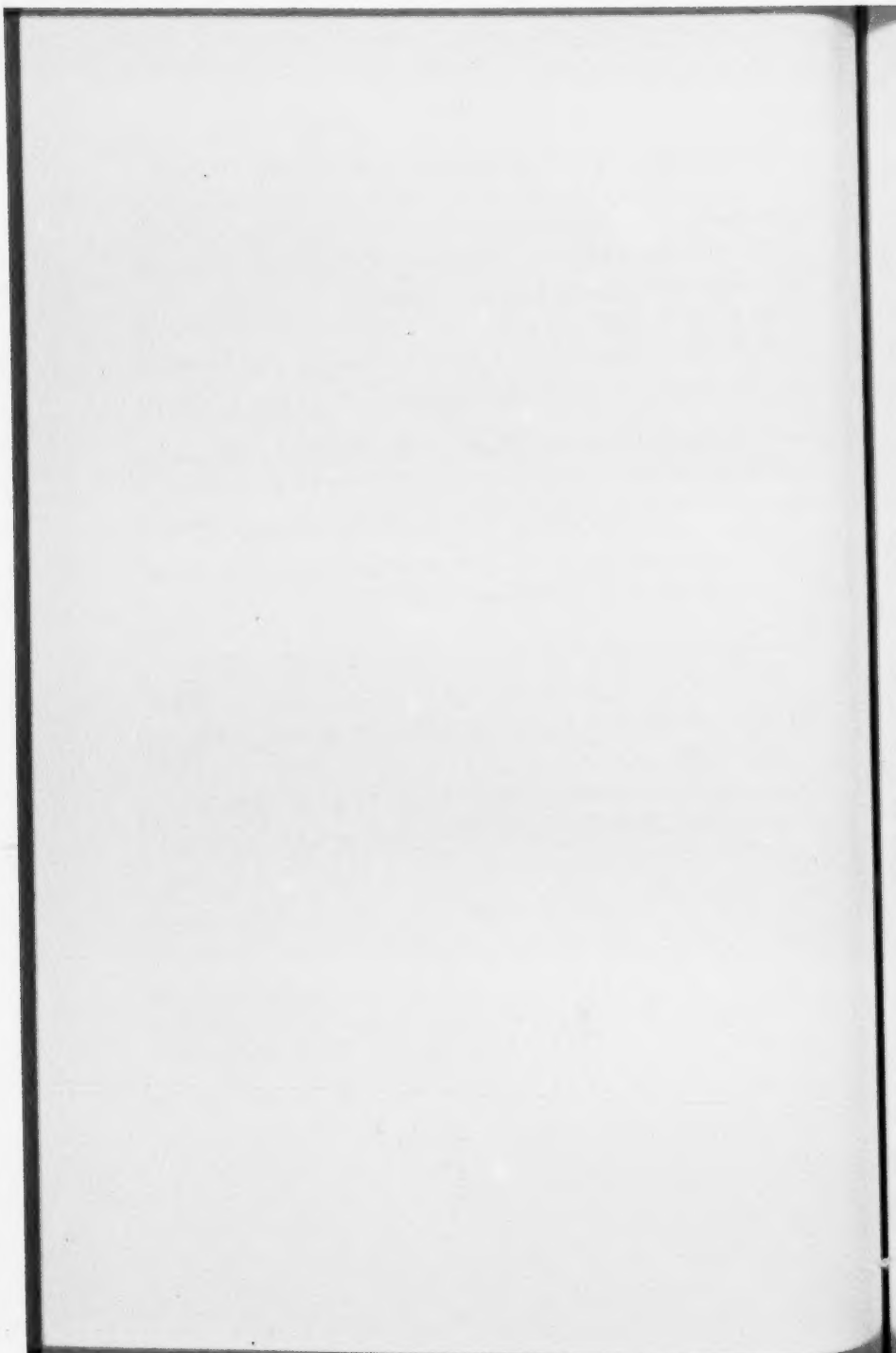

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No.

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Respondents-(Respondents-Appellants).

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Amtorg Trading Corporation, *et al.*, for a writ of certiorari to the Circuit Court of Appeals for the Ninth Circuit respectfully shows:

Jurisdiction

This is a suit in admiralty brought by your petitioners as libellants in the United States District Court for the Western District of Washington arising out of the abandonment by the S. S. WILDWOOD of a voyage from Jersey City to Petropavlovsk and Vladivostok, in the Union of Soviet Socialist Republics in February and March, 1940 and the subsequent discharge by the vessel of the cargo at Tacoma, Washington.

This petition seeks a review of the decision of the Circuit Court of Appeals for the Ninth Circuit reversing a decree for the libellants in the District Court. The date of the order for mandate which is the decree sought to be reviewed is (R. 2151) Feb. 23, 1943.

The jurisdiction of this Court is invoked under Section 240 of the Judicial Code as amended by the Act of February 13, 1925 (43 Stat. 938; 28 U. S. Code, Para. 347).

Summary Statement

The opinion of the District Court is officially reported in 40 Fed. Supp. 956 and is printed in the record on pages 120-153. Its findings are printed at pages 159-215.

The opinion of the Circuit Court of Appeals is reported in 133 F. (2d) 765, and is printed in the record at pages 2132-50.

The WILDWOOD, an American vessel operated by respondents, sailed from Jersey City, New Jersey, on February 19, 1940 for Vladivostok with a general cargo, including copper strips and bars and machinery, all shipped under bills of lading by Amtorg Trading Corpo-

ration (hereinafter called the libellant). Freight in the amount of $111,664 was prepaid (172).*

On March 18, 1940, shortly before the vessel arrived off Honolulu, the libellant, having received information that the port of Vladivostok was congested with vessels awaiting discharge, requested respondent to change the destination of the vessel from Vladivostok to Petropavlovsk, and it was agreed that the vessel should proceed to Petropavlovsk to discharge part of her cargo and at libellant's option, should thereafter proceed to Vladivostok to discharge the remainder (Findings, 165-8; Opinion Dist. Ct., 125).

The Claim Based on Abandonment of the Voyage

The suit, so far as concerns the principal claim, arises out of the failure of the vessel to proceed to Petropavlovsk and her return to and discharge at Tacoma, Washington, in compliance with an order cabled to the master by the owner at New York and now claimed to have been occasioned by the fear that the vessel would be stopped and examined by the British for contraband. The cable was sent March 28, 1940, when the vessel was about 1200 miles beyond Honolulu on her way to Petropavlovsk and about 1500 miles from the port (Findings, 168-9).

The port of Petropavlovsk is on the Kamchatka Peninsula, facing the open Pacific and has no rail connection with Europe. The port of Vladivostok is on the Sea of Japan, is a terminus of the Trans-Siberian Railway and can only be approached from the north or east by narrow

* All references are to pages of the printed Record.

straits between the Islands of Japan. The two ports are 1350 miles apart.

The Circuit Court of Appeals found that the turning back of the vessel was justified because of the receipt on March 27 and 28 of a report of the interception by British vessels of the Russian steamship MAYAKOVSKY for contraband inspection on a voyage from the United States to Vladivostok. That Court found that the MAYAKOVSKY had been intercepted by the British about 100 miles off Tsugaru Strait leading into the Sea of Japan "the normal channel or approach to Vladivostok" (p. 2140). These straits were about 1300 miles from Petropavlovsk, and the MAYAKOVSKY was in fact seized after she had visited Petropavlovsk and when she was approaching Vladivostok (R. 2074, 2076).

On January 14, some six weeks before the WILDWOOD sailed, publicity had been given in the New York newspapers and in Associated Press dispatches to the interception by the British for contraband inspection of the Russian vessel SELENGA while on a voyage from the Philippines to Vladivostok (Findings, 186, 190) and of this the District Court held, without challenge, that the respondent knew or should have had knowledge when the vessel sailed (Findings, 196).

The report of the subsequent interception of the MAYAKOVSKY resulted in renewed speculation by several so-called radio news analysts and newspapers as to whether the British did not intend to intercept vessels bound to Vladivostok carrying materials on the British contraband list and likely to be sent to Germany over the Trans-Siberian Railway (Findings, 191-3).

On March 26 and 27 the respondent had received by cable from the master inquiries with respect to discharging facilities and ice conditions at Petropavlovsk (Opinion Dist. Ct. 127; Findings 167-8). In the forenoon of the following day, March 28, respondent informed the libellant that it considered Petropavlovsk an ice bound port and demanded a guarantee of $250,000 to cover delay and demurrage in case the vessel was seized (R. 1463, 1466, 1489, 1625). Libellant was given until 2 p. m. to obtain authority from Moscow to give this bond (R. 1466, 1491, 1597, 1598). At 2 p. m. the bond not having been furnished, respondent advised libellant that the vessel would be turned back (R. 1467). On March 29 respondent gave written notice to the libellant that the vessel was returning to Seattle because of the news received on March 27 with respect to the action of the British (Opinion Dist. Ct., pp. 128-9). The libellant promptly protested and notified respondent that it would be held liable for damages (Findings, 171).

The master took no part whatever in this decision. At 2:06 p. m. March 28, respondent sent a cable to him in answer to his inquiries as to ice and discharge conditions as follows: "Return Seattle immediately confirm also state present position" (Findings, 168-9; R. 1620, 848, 858, 996). The master thereupon abandoned the voyage supposing that he had been ordered to do so on account of ice conditions at Petropavlovsk. In fact Petropavlovsk was not ice bound and the cargo could have been discharged there without difficulty (Findings, 178, 203).

The master knew of the seizure of the MAYAKOVSKY but on his return, he asserted publicly that he turned back only by reason of the orders from the owner (Findings, 202; R. 1027).

No vessel of any kind was ever seized or even challenged in proceeding to Petropavlovsk; it was not in any threatened war zone; and the British Government never announced any policy of contraband control of its commerce (Findings, 203). Nor is there anything in the record to indicate the presence of British vessels at any time within 1000 miles of that port. There was indeed no occasion for attempting to interfere with vessels proceeding thither as any cargo bound for Europe from Petropavlovsk would have to be shipped by sea to a rail head, presumably Vladivostok. Numerous vessels called at Petropavlovsk in March, April and May, 1940, without interference (R. 1989, 1990).

There was never any threat by Great Britain to blockade or interfere with United States vessels proceeding either to Petropavlovsk or Vladivostock nor any announcement by the British Government of the putting into effect of contraband control of such vessels with respect to either of these ports, nor any official suggestion that United States vessels bound thither with contraband cargo would be detained or interfered with. No United States vessel was at any time detained or otherwise interfered with in proceeding to Vladivostok and no neutral vessel was ever detained in proceeding to that port except the Soviet vessel SELENGA (which was reported intercepted before the WILDWOOD ever sailed) and the Soviet steamship MAYAKOVSKY (Findings, 197).

In fact, after the WILDWOOD had redelivered the cargo at Tacoma it was reshipped on other vessels and delivered without interference at Vladivostok (R. 636). Likewise while the WILDWOOD was on her voyage a number of vessels were en route to Vladivostok, only the MAYAKOVSKY being

detained (R. 1973, 2074, 1990, 1991; Findings, 189). There is no record of any of these vessels having turned back.

There is no proof that the cargoes of either the SELENGA or the MAYAKOVSKY were condemned or that either vessel suffered any loss except such as arose from the diversion and delay for examination.

At the time the WILDWOOD sailed from Jersey City and at the time the destination of the voyage was changed, Great Britain and Germany were at war and Russia was a neutral nation. World war conditions then prevailed rendering shipping hazardous (Findings, 179). The British blockade of Germany had been announced on September 5, 1939 and the British Contraband Control Service became immediately effective. The British contraband list, which included many of the materials forming a part of the cargo of the WILDWOOD, had been published on September 6, 1939 and had received wide publicity (Findings, 179). Dozens of vessels bound for neutral ports in the Atlantic and Mediterranean had been stopped by the British and taken to various control ports for examination of their cargoes (Findings, 179-183).

The activities of the British Navy in the Sea of Japan and off the Japanese ports had been several times reported in newspapers before the WILDWOOD sailed (Findings, 185, 196).

The nearest American port to the point of her turning back was Honolulu where there were ample facilities for discharging (Findings, 178). The vessel did not call at that port. Libellant then requested that the vessel discharge at Portland (Findings, 205). This request was refused unless the libellant would waive all claims against

the vessel (R. 1602-4). Without any concurrence or consent by the libellant the vessel was ordered by the owner to proceed to Tacoma, Washington, where she was discharged and immediately took on a cargo on another venture of the shipowner (R. 906-7, 1428).

The shipowner not only retained the prepaid freight but as a condition of delivery of the cargo required the libellant to pay $17,000 additional return freight to Tacoma and some $22,588.72 expenses for discharging and storage of the cargo (Findings, 172). Libellant's damages by way of expenses alone arising from the turning back of the vessel were about $385,000 (Findings, 173).

Cargo Damage

A part of the cargo discharged at Tacoma was found to be badly damaged by salt water and for this damage a supplemental libel was filed.

Decisions Below

The District Court awarded the libellant a decree, both for the damages resulting from the deviation and for the damage to cargo. As to the claim for abandonment of the voyage, the Court found that the cancellation of the voyage and the order to return on March 28 primarily "was given because of supposed 'ice bound port' and lack of facilities for discharging at Petropavlovsk and possible delay and demurrage as a result of this supposed condition" (R. 202).

It further found that "there was no justification for the cancellation of the voyage" and that such cancellation

"constituted an unwarranted deviation and breach of contract" (R. 205, 208).

As to the claim for cargo damage, the Court, on conflicting evidence, found that it was caused by leakage of water from the chain locker which had entered that locker through the chain pipe leading to the deck, and that due diligence had not been exercised to make the vessel seaworthy (R. 206).

The Circuit Court of Appeals, reviewing the evidence as to the possible danger of proceeding to the ports of destination, held as follows (p. 2148):

> "We hold that, based upon its knowledge on March 27, 1940 that the British had seized the neutral MAYAKOVSKY, on a similar voyage, the Carrier had a reasonable apprehension of a real danger of the seizure of the WILDWOOD by the British Naval vessels on her voyage *to Vladivostok* via Petropavlovsk; that the danger so reasonably apprehended was a far greater war hazard than that contemplated by the parties when the charter was made for the voyage to Vladivostok, the bills of lading issued on February 20th, and on March 18 when the agreement was altered to discharge part of the cargo at Petropavlovsk; and that on March 28, the Carrier was entitled under Clause 4 of the bill of lading, as well as under the General Maritime Law, to abandon the voyage and return to Tacoma, Washington." (Italics ours.)

Clause 4 of the bill of lading referred to in the passage above provided, in part as follows:

> "In any situation or wheresoever occurring * * * which in the judgment of the *Carrier* or Master is

> likely to give rise to capture, seizure, detention, demurrage, *delay or disadvantage* to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent or unlawful for any reason to proceed on or continue the voyage or to enter or discharge the goods at the port of discharge, or to give rise to *delay or difficulty* in arriving, discharging at or leaving the port of discharge * * * the master may proceed or return directly or indirectly, to or stop at such port or place whatsoever as he or the Carrier may consider safe or advisable under the circumstances * * *" (174). (Italics ours.)

As to this clause, the Circuit Court of Appeals held (p. 2135):

> "This agreement as to the Carrier's discretion to abandon the voyage gives no more power of abandonment than exists in the absence of clause 4."

Nevertheless the Court held that the increase of hazard was such "as would require the carrier to exercise the powers given it under Clause 4 and give it the right to turn the WILDWOOD away from this newly threatened danger." Elsewhere in its opinion it also relies on Clause 4 and ultimately finds that the turning back was justified not only by the general maritime law but by Clause 4. In so holding it apparently regarded the "general maritime law" and Clause 4 as co-extensive.

The Court bases its decision on principles assumed to be corollary to the two leading decisions of this Court with respect to frustration at time of war: *The Kronprinzessin Cecilie*, 244 U. S. 12 and *The Styria*, 196 U. S. 1.

In *The Kronprinzessin Cecilie* the venture was frustrated because of the danger to *a belligerent vessel*, her

passengers and part of her cargo from entering *an enemy port* in time of war. In *The Styria* the venture was frustrated at the port of loading because of the danger of carrying cargo, which had become contraband, through waters adjacent to the territory of one belligerent *to the port of the other belligerent.* In both cases war intervened *after* the venture began (see discussion of these decisions, Petitioners' Brief, pp. 21-23).

As to the claim for cargo damage, the Circuit Court of Appeals after reviewing the evidence, rejected the findings of the Court below as to the cause of the damage and made its own findings that the cause was the entrance of sea water through the hatch opening during stormy weather at sea and that this was a peril of the sea and excused the carrier from liability.

The Questions Presented and the Reasons for Review by This Court

1. *Is the doctrine of frustration, as defined in The Kronprinzessin Cecilie and The Styria, applicable in any of the following situations to the voyage of a* NEUTRAL *vessel, begun in time of war, to a* NEUTRAL PORT *with cargo on board which would be contraband if ultimately bound to an enemy destination:*

a. *Where the inevitable pecuniary loss to the cargo owner from turning back exceeded the contingent pecuniary loss to which the shipowner might have been subjected in going forward?*

Since there was no danger to passengers involved, as in the case of *Kronprinzessin Cecilie,* and no danger of confiscation of the vessel as in both the *Kronprinzessin*

Cecilie and the *Styria*, the frustration can be justified only on the basis of pecuniary risk to the shipowner arising from possible detention. The Circuit Court of Appeals, however, made no attempt to balance the pecuniary risk of the shipowner over against the certain pecuniary loss of the cargo owner. It did not take into consideration or mention the damages to the cargo from abandonment of the voyage amounting to $385,000 (Findings, 173).

In suggesting that the shipowner might have been liable for the value of the cargo if the ship had been intercepted and the cargo condemned, the Court plainly erred as to the law (see Brief, p. 24).

b. *Where no contraband control was ever proclaimed or enforced by any belligerent with respect to the vessel's port of discharge and there is no proof or finding that she carried any cargo bound for an ultimate belligerent destination or that the aggravation in the risk of proceeding to the port of discharge occurring during the voyage was such as to change the nature of the voyage?*

There was no specific finding by the Circuit Court of Appeals of any aggravation during the course of the voyage of risk in proceeding to Petropavlovsk as distinguished from Vladivostok.

As appears from the passages from the opinion quoted in petitioners' brief, pages 29, 30, the Court seems to have based its opinion on the supposed danger of proceeding to Vladivostok and not the danger of proceeding to Petropavlovsk. No vessel was ever intercepted by the British in proceeding to the latter port or within more than 1000 miles of it.

There was in fact no need of considering the dangers of proceeding to Vladivostok at all since it was the turning back from the voyage to Petropavlovsk that constituted respondents' breach of duty, if any.

If, however, it is to be inferred that the Court in its references generally to "Russian Siberian ports" meant to suggest that there was such an increase of the risk, the question is fairly presented, in view of the undisturbed findings of the District Court with respect to freedom of trade to Petropavlovsk, whether *any palpable* supposed increase of risk would justify frustration or whether the increase of risk over that existing at the beginning of the voyage must be such, as to make the contract of the ship one "into which she has never entered" (*The Styria,* 186 U. S. 1, 14), or reasonably to render the contract one the performance of which "it cannot be believed that the contractee would have demanded or the contractor would have assumed" (*The Kronprinzessin Cecilie,* 186 U. S. 12, 22).

c. *Where the master as the representative of all the interests did not participate in the decision to turn back and returned on the order of the owner without knowledge of the reason for the order?*

In both THE STYRIA and THE KRONPRINZESSIN CECILIE the master made or participated in the decision to turn back, and in THE STYRIA especially his traditional position as the representative of both cargo and ship in an emergency and the extent of his discretion in all matters affecting the safety of the interests entrusted to him was emphasized.

The answer given by the Circuit Court of Appeals in each of these situations and in all of them combined was in favor of the shipowner.

Its decision constitutes a sweeping extension of the principles enunciated in *The Kronprinzessin Cecilie* and *The Styria*. These decisions have heretofore been considered monuments in the law of frustration of contracts in time of war. If these decisions are to be supplanted, this should not be done by a Court of inferior jurisdiction.

2. *Where a voyage is in two legs and requires discharge of a part of the cargo at one port and, at the option of the shipper, discharge of the remainder of the cargo at another port, is the owner entitled to abandon the voyage to the first port of discharge (retaining prepaid freight and charging additional freight for the return voyage) because of dangers or perils which the vessel might encounter in proceeding from the first port of discharge to the second?*

This question is fairly presented because of the Court's insistence and reliance upon the dangers of proceeding to Vladivostok rather than Petropavlovsk.

The holding in the present case conflicts with the principles of previous decisions of this Court as well as the Courts of other Circuits and presents a question of great importance to the commercial and shipping world as to how far the principles of frustration are operative with respect to voyages with alternative or optional ports of destination.

3. *Is Clause 4 of the bill of lading (the frustration clause) in so far as it extends the excuses for failure to perform the bill of lading contract beyond those provided for in the Carriage of Goods by Sea Act, 34 U. S. C. 1304 and the Harter Act, 46 U. S. C. 191, 192 valid?*

A frustration clause in the form of Clause 4 has recently become almost universal in ocean bills of lading issued in this country without having received the approval of the Courts in any case where its inconsistency with the statute has been considered. This clause in substantially the same form was taken over from bills of lading of private carriers as Clause 4 of the standard bill of lading in use by the War Shipping Administration (Gen. Order 16, July 4, 1942; Fed. Reg. V. 7, p. 6566).

On its face this clause has the effect of authorizing the immediate abandonment of the voyage in the discretion of the carrier and the retention of the freight if any situation arises which, in the *carrier's* judgment, may result in *delay, disadvantage or difficulty to the vessel* in carrying out the contract. This clause says nothing about the comparative loss or disadvantage to the shipper.

The Carriage of Goods by Sea Act (1936) provides (46 U. S. C. 1303) that the carrier shall properly and carefully load, handle, stow, *carry,* keep, care for and *discharge* the goods carried and that "any clause, covenant or agreement in a contract of carriage relieving the carrier or the ship from liability for loss or damage to or *in connection with* the goods arising from the negligence, fault or *failure in the duties and obligations provided in this section* or lessening such liability otherwise than as provided in this chapter or Section 25 of Title 49, shall be null and void and of no effect".

Section 1304 of the Act lists the exceptions to which the carrier may be entitled, including restraint of princes, but the causes excepted in the Act to excuse the carrier must of course *cause* the non-performance through commercial

or actual impossibility. It is not sufficient that such causes should merely be the occasion for an opinion on the part of the *carrier* that they *may* result in "*delay*" or "*disadvantage*" to *him.*

The Harter Act, 46 U. S. C. 190, 191, provides in part as follows:

> "§1. It shall not be lawful for the * * * owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant or agreement whereby it * * * shall be relieved from liability for * * * proper delivery of any and all lawful merchandise or property committed to it or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.
>
> "§2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United States of America and foreign ports, her owner, master, agent or manager, to insert in any bill of lading or shipping document any covenant or agreement * * * whereby the obligations of the master, officers, agents or servants to properly deliver same shall in any wise be lessened, weakened or voided."

Despite these provisions of law the Court interpreted Clause 4 as if they did not exist. In suggesting that the liability of the carrier would be the same whether Clause 4 was in the bill of lading or not, the Court apparently did not mean to imply that any part of the clause was invalid as contrary to law but only that the *law* was substantially co-extensive with the provisions of *Clause 4;* otherwise the

reference to the powers of the carrier "given it under Clause 4" (p. 2140) is meaningless.

The question here involved is one of the meaning of, interpretation and effect of important statutes of the United States on bill of lading provisions in common use. Doubts have been suggested as to the validity under the Carriage of Goods by Sea Act of frustration clauses much less drastic than the one here involved (see Brief, p. 33). The question, though of fundamental importance in Maritime Law, has never been passed on by this Court.

4. *Where a voyage is frustrated owing to the risk of proceeding, is the cargo owner, who has prepaid freight to destination, entitled to have the cargo discharged at the nearest convenient port to the place of turning back, or is the shipowner entitled to select for its own convenience without concurrence of the cargo owner a more distant port of discharge and to charge freight from the point of turning back to such port of discharge?*

After failing to discharge at the nearest United States port (Honolulu) where the facilities were adequate (Findings, 178) and refusing to discharge at the other ports selected by libelant the vessel proceeded to Tacoma, Washington, where another cargo was apparently awaiting her (R. 906-7). The cargo owner was then compelled to pay additional freight to Tacoma from the point of turning back.

The District Court held she was not entitled to do this (Findings, 205).

It is essential that, as a guide to shipowners and cargo in similar situations, this Court determine whether after

frustration of the voyage, in cases where the vessel has received the freight, the master "will still have the duty of providing for the cargo in the way most beneficial to its owner" as hitherto supposed; (Scrutton on Charter Parties and Bills of Lading, Fourteenth Edition, p. 134 note; Cargo of the Argos, 1873 L. R. 5 P. C. 134, 165); or whether the shipowner has the untrammeled right to select a port of discharge and to charge additional freight thereto.

5. *In view of Admiralty Rule 46½ providing for findings of fact and conclusions of law by the District Court and the developments of the law with respect to the scope of admiralty appeal, does such an appeal at present result in throwing open all questions of fact for a redetermination on the weight of the evidence by the Appellate Court, as held in The Ernest H. Meyer, 84 F. (2d) 496 (C. C. A. 9) (approved and followed in the present case); or is the present scope of an admiralty appeal analogous to the scope of an appeal in equity or at law after a trial before a Judge, as defined in Rule 52(a) of the Rules of Civil Procedure, as held in Petterson Lighterage & Towing Corporation* v. *The New York Central R.R. Co., 126 Fed. Rep. (2d) 192 (C. C. A. 2).*

The Circuit Court of Appeals, in reappraising the evidence, making new findings and drawing opposite inferences from those drawn by the District Court with respect to the question of abandonment and in making entirely new findings in respect to the question of cargo damage, cited and applied its own decision in *The Ernest H. Meyer,* 84 F. (2d) 496, thus bringing into relief the divergence between the rules of the Ninth Circuit and those of the Second Circuit, with respect to the scope of an admiralty appeal.

This question is discussed more fully in Petitioner's Brief, pages 34 *et seq.*

The difference between the views of the Second and those of the Ninth Circuits on this point requires an early review by this Court of the principles involved.

WHEREFORE your petitioners respectfully pray that a writ of certiorari issue out of and under the seal of this Honorable Court to the Circuit Court of Appeals for the Ninth Circuit commanding that Court to certify and send to this Court for its review and determination a full and complete transcript of the record, and that the decision of said Circuit Court of Appeals be reversed and that petitioners have such other and further relief as may be just.

Dated: New York, N. Y., May 5th, 1943.

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport") VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners,

By CHARLES RECHT,
Counsel

Certificate

I hereby certify that I have examined the foregoing petition and that in my opinion it is well founded and entitled to the favorable consideration of this Court and that it is not filed for the purposes of delay.

CHARLES RECHT,
Counsel
10 East 40th Street,
New York, N. Y.

Supreme Court of the United States

October Term 1942

No.

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libellants-Appellees),

against

AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

Respondents-(Respondents-Appellants).

BRIEF IN SUPPORT OF PETITION

POINT I

The unwarranted extension by the present decision of the principles of frustration of contracts in time of war as defined by this Court in *The Kronprinzessin Cecilie* and *The Styria* raises a question of primary importance in maritime commerce.

The decision of the Circuit Court of Appeals is professedly based on the above mentioned decisions.

In *The Kronprinzessin Cecilie,* 244 U. S. 12, this Court held that the master of a German vessel at the beginning of the last World War, bound from New York to a British port, was entitled to turn back, on learning that war between Great Britain and Germany was imminent. When the voyage was abandoned war had been declared by Austria against Serbia; Germany had declined a proposal for a conference of ambassadors in London and had sent an ultimatum to Russia; the naval forces of both Germany and Great Britain were being concentrated and business had been practically suspended on the London Stock Exchange. The vessel had sailed in time of peace and turned back in time of war at a point in her voyage when proceeding further would have so exhausted her fuel that turning back would have been impossible. The vessel was a German vessel, subject to forfeiture, and had on board 667 Germans and 406 Austrians who might have been subject to removal and internment in England. The Court on the analogy of contracts for personal service excused by death or the prevalence of cholera in a place where work was undertaken, held that the master was justified in returning.

In *The Styria,* 186 U. S. 1, this Court held that an Austrian steamship which had loaded a cargo of sulphur at an Italian port to be delivered in New York was justified in discharging the sulphur at the port of lading on the outbreak of the Spanish-American war, sulphur being contraband cargo. The vessel in proceeding to New York which had become a belligerent port after the loading, would have been obliged to proceed through the Straits of Gibraltar and along the Spanish coast with the result that she would probably have been seized and her cargo confiscated. As the enemy destination and the nature of the cargo was

known to the master, the vessel also might have been subject to forfeiture. No prepaid freight, so far as appears, had been collected on the cargo and the vessel was carrying other cargo, not contraband, whose owners had a right to demand that the vessel proceed. The vessel was also under engagement to pick up a perishable cargo at Palermo which would have spoiled if not loaded.

The Court held in these circumstances that the master in the interest of all concerned was justified in electing to discharge the cargo in order that he might proceed on the voyage.

Neither of the above mentioned decisions would justify the turning back of a *neutral* vessel bound to a *neutral port* in any of the situations described under Questions numbered 1a, 1b or 1c in the Petition.

All these questions should be considered with reference to a voyage toward Petropavlovsk, the port for which the vessel was bound and from which voyage she was recalled, although on the findings of fact made by both courts the result should have been the same if the voyage were to be considered as one toward Vladivostok.

As to Question 1a:

The damages to the cargo owner from turning back consisted not only of the loss of prepaid freight and return freight to the place of delivery exacted by the respondent but also the cost of storing and reforwarding. The District Court found that these actual outlays amounted to $385,000 (p. 173). These damages were neither contingent nor conjectural.

The damage to the shipowner even in the remote event of diversion of the vessel and confiscation of the cargo would have consisted only of possible delay to the vessel. The limit of such damages as estimated by the owner itself in demanding a bond amounted to only $250,000 (R. 1466, 1489). On the other hand, the shipowner profited by the turning back because of his retention of prepaid freight and the collection of additional freight on the return voyage.

Neither Court found that there was any danger of condemnation of the vessel and the record does not indicate any instance during this war of the confiscation of a neutral vessel by the British for carrying contraband to a neutral port.

The Circuit Court of Appeals did not question the finding of the District Court that:

> "The SELENGA and MAYAKOVSKY were seized for contraband and for inspection of the cargo in the same manner that vessels were detained on the Atlantic and Mediterranean" (p. 189).

The suggestion in the opinion of the Circuit Court of Appeals that the vessel might have been liable to the cargo owner for confiscation of the cargo, if it took place, is wholly without foundation in law. The vessel was bound with lawful cargo to a neutral port; there is no proof or intimation in the record of any ultimate enemy destination and therefore nothing on which to base a finding that the cargo ever would be condemned, and even if it had been condemned on account of such putative destination, no blame could attach to an innocent shipowner. The cargo interests, moreover, were themselves urging the

vessel to proceed and naturally could not recover damages resulting from that course of action.

The actual damage necessarily sustained through the vessel's turning back and the collection by the shipowner of additional charges therefore exceeded any probable damage that would have been sustained by the shipowner had the vessel actually been detained; while the shipowner profited by the abandonment.

Par. 165 of *Restatement of the Law of Contracts* (Am. Law Inst.) dealing with impossibility as a defense, provides in part as follows:

> "In holding whether a promisor's failure to begin or to continue performance is reasonable under the rule of Subsection 1 consideration is given to * * * (b) the extent of physical or pecuniary harm or loss to himself or to others likely to be incurred by attempting performance as compared with harmful consequences likely to be caused to the promisee by nonperformance."

The Circuit Court of Appeals gave no weight whatsoever to this consideration; considered only the risk to the shipowner; and wholly misapprehended the principles of the two Supreme Court cases above mentioned where the probable loss to the vessel and disinterested cargo exceeded many times any pecuniary loss to the libellants from failure to proceed with the voyage.

As to Question 1b:

The master facts are that after the WILDWOOD sailed a single vessel was intercepted in the vicinity of the Straits forming the approach to the Sea of Japan and Vladivostok

and more than a thousand miles from Petropavlovsk, and that there was no interference with commerce to Petropavlovsk at any time.

The decisions both in THE KRONPRINZESSIN CECILIE and THE STYRIA were based on a change in the nature of the voyage owing to the outbreak or imminent outbreak of war in the course of the venture. In *The Styria* the Court said (p. 14):

> "The ship made no contract to carry contraband of war to the port of a belligerent and should not be held to the obligations of a contract into which she has never entered."

In *The Kronprinzessin Cecilie,* the Court said, page 22:

> "The seeming absolute confinement to the words of an express contract indicated by the older cases like *Paradine* v. *Jane, Aleyn,* 26, has been mitigated so far as to exclude from the risks of contracts for conduct (other than the transfer of fungibles like money,) some, at least, which, if they had been dealt with, *it cannot be believed that the contractee would have demanded or the contractor would have assumed.*" (Italics ours.)

In referring to the judgment of the master as to the danger the Court said, page 23:

> "It was the opinion very generally acted upon by German shipowners."

In the present case the contract from the beginning was one made in time of war to carry cargo to a neutral port which would be contraband only if bound ultimately to a belligerent destination. There was no change in the nature

of the contract and the facts are precisely contrary to those indicated in THE KRONPRINZESSIN CECILIE with respect to the attitude of other masters and shipowners. So far as the record shows THE WILDWOOD *was the only vessel that turned back.*

If the Circuit Court of Appeals is to be regarded as having given any consideration at all to the risk of proceeding to Petropavlovsk, as distinguished from that of proceeding to Vladivostok, its decision goes to the length of holding that *any appreciable or imaginary aggravation of risk* occurring during the course of a voyage justifies its abandonment.

This doctrine was rejected both in *W. R. Grace & Co.* v. *Luckenbach S.S. Co.*, 267 Fed. 676, 680 (C. C. A. 4), where it was held that the outbreak of war and the possible danger of capture or destruction by German warships on a voyage from Chili to New York at the beginning of the last war did not justify the shipowner in refusing to perform, and, in the language of *The George J. Goulandris,* 36 Fed. Supp. 827, 834, where it was held that the outbreak of war must be accompanied by "actual and substantial" dangers and not those in the category of rumor in order to justify rescission.

As to Question 1c:

In THE STYRIA stress was laid on the independent position of the master as the representative of both cargo and vessel in an emergency.

The Court quoting the opinion of the District Judge said (p. 9):

> "The master, as the agent of all concerned, is still bound to a prudent regard for the interests of the cargo and must endeavor to hold the balance evenly between ship and cargo when their interests conflict."

In the present case the master did not even know why the voyage had been discontinued by the shipowner. The latter acted alone and solely in its own interest.

No justification can therefore be found in THE STYRIA for the present decision which must rest solely on the doctrine of commercial impossibility.

It is believed that this is the only case which has arisen in this country involving frustration by war conditions of a voyage between neutral ports where physical danger to life or property was not involved.

Both THE KRONPRINZESSIN CECILE and THE STYRIA involved voyages to belligerent ports, were regarded as close cases at the time they were decided. In both cases at least one of the lower courts differed from this court. If now the long accepted principles of those decisions are to be recast so as to embrace the situations above outlined and the limits of the doctrine of frustration of contracts of ocean carriage are to be relocated, such a step, involving as it does questions of fundamental importance in the maritime law, should at least have the consideration and approval of this Court.

POINT II

The Court in holding that the increase during the voyage of the risk of proceeding to *Vladivostok* excused the vessel from proceeding to *Petropavlovsk* and frustrated both the first and second legs of the agreed voyage, contravened principles established by decisions of this Court and in the Second Circuit.

The District Court found as follows:

> "It was the duty of the vessel to deliver the cargo at Petropavlovsk unless there was a change in the 'World War' conditions which increased the hazards to the WILDWOOD of both ship and cargo to a degree which would have deterred a prudent sailor from proceeding. While there were no such increased hazards as to the port of Vladivostok, a diversion of the ship to Petropavlovsk even lessened any danger as it 'took the ship further North' and away from any port of danger" (p. 204).

The Circuit Court of Appeals made no specific finding as to the possible risk in proceeding to *Petropavlovsk* and it is obvious from the opinion that it was chiefly concerned with its view of the risk of proceeding to *Vladivostok*, 1350 miles to the southwest. It said (p. 2133):

> "On March 15 British naval vessels had seized the neutral Russian steamer MAYAKOVSKY also with a cargo of copper bullion on a voyage from San Francisco also to *Vladivostok* via Petropavlovsk while that steamer was in the North Pacific some 400 miles off Tsugaro Strait and taken the vessel to Hongkong some 1700 miles from Vladivostok * * *."

* * *

At page 2139:

> In considering *de novo* the question whether the news of the MAYAKOVSKY warranted the inference of an increased hazard over that contemplated by the carrier on March 18, before it was known to it, we thus have the shipper's own estimate that when the voyage was abandoned *the port of Vladivostok was blockaded.*
>
> As stated, we cannot find that prior to the MAYAKOVSKY's seizure there was evidence that *the hazard in the voyage to Vladivostok* amounted to running a blockade or anything approaching it.
>
> Assuming that the word 'blockade' is at all applicable to the port of Vladivostok, the action of the British in seizing the SELENGA off Formosa in the channel approaching Vladivostok some 1700 miles distant to the South of that port is at most but a partial blockade. It is such a partial blockade which is the risk assumed by the carrier. It seems clear that it is more than doubling the hazard of that partial blockade to have a hovering of British naval vessels 1800 miles northerly from Formosa on the great sailing circle from the United States leading from the Northeast to Tsugaro Strait, *the normal channel or approach to Vladivostok from the Northeast and but 500 miles distant from that port. It is such an increase of hazard as would require the carrier to exercise the powers given it under Clause 4 and give it the right to turn the* WILDWOOD *away from this newly threatened danger.*" (Italics ours.)

The Court then summarized its findings in the passage above quoted (p. 9 of the Petition) stating that "the carrier had a reasonable apprehension of a real danger of the seizure of the WILDWOOD by the British naval vessels *on her voyage to Vladivostok via Petropavlovsk.*"

The real concern of the news analysts, whose speculations form the principal basis of the decision, is thus expressed in a quotation in the Findings of the District Court (193) from a London radio broadcast:

> "For weeks the British have been worried about war materials reaching *Vladivostok* from American ports. They have believed that such material was designed for Germany by way of the Trans-Siberian Railway."

The shipowner, even if the vessel could not have proceeded to Vladivostok, could have discharged the whole cargo at Petropavlovsk, retaining or collecting the freight. This would have been complete performance of the contract if there was good ground for not undertaking the Vladivostok leg of the voyage. *Aktieselskabet Olivebank* v. *Dansk Svovlayre Fabrik* (1919), 2 K. B. 162 (C. A.), 88 L. J. (N. S.) K. B. 745.

This Court has held that where one of the alternatives of a contract becomes impossible, the promisor nevertheless is bound to render the alternative performance which remains possible.

In *Yankton Sioux Tribe of Indians* v. *United States*, 272 U. S. 351, the Government had undertaken, in the alternative, that the question of the title of the complainant tribe to a certain parcel of land should either be referred to the court for determination or, in default of that being done, should be vested in the Indians. One of such alternatives became impossible but this Court held that the Government was required to perform the other, saying:

> "Granted the impossibility of the first alternative, the Government, nevertheless, took the risk

> and must in accordance with its definite undertaking to that effect, suffer the stipulated consequence in virtue of the principle that where promises are in the alternative the fact that one of them is at the time or subsequently becomes impossible of performance does not, at least, without more, relieve the promisor from performing the other" (p. 358).

In *P. N. Gray & Co.* v. *Cavaliotis,* 276 Fed. Rep. 565 (aff. 293 Fed. 1018, C. C. A. 2), it was held that where a seller had agreed to export certain materials from Canada but had the privilege "of shipping from the New York refinery", an embargo on exports from Canada did not excuse performance. The Court said (p. 571):

> "This clause rendered inoperative any defense concerning the embargo because where rendered impossible to perform in one place by action of the Government nevertheless it was possible to perform in the other. It was only where both alternatives are rendered impossible that a legitimate defense could be predicated upon an embargo."

In Restatement of the Law (Am. Law. Inst., Contracts, p. 872), the commentator said:

> "Unlike temporary impossibility, impossibility of performing part of a promise rarely discharges a promisor beyond the extent of the impossibility."

The decision in the present case to the contrary deals with a matter of importance to maritime commerce and is at variance with the general law of contracts as recognized by this Court and the Circuit Court of Appeals for the Second Circuit.

POINT III

This decision involves the effect of the provisions of the Carriage of Goods by Sea Act and the Harter Act on the frustration clause now in common use in bills of lading.

Clause 4 of the bill of lading and the applicable statutes are quoted in the Petition (pp. 15, 16). The now common use of the clause is there indicated.

In *Scrutton on Charter Parties and Bills of Lading* (14th Ed. 1939) the author in commenting on a clause reading as follows:

> "Should hostilities render it unsafe for the steamer or her cargo to proceed to the port of destination she has liberty to discharge her cargo at any near available port and there end her voyage giving shippers due notice of such fact."

said:

> "It is possible that in cases to which the Carriage of Goods by Sea Act 1924 applies such clauses as these appearing in a bill of lading would be voided by Article 3, Rule 8 of the Schedule Rules."

The Rule referred to is the same as that quoted above, page 15, from our own Carriage of Goods by Sea Act.

The clause here involved departs from the carrier's statutory obligation much further than that referred to by Scrutton since it provides that the criterion for abandonment is the *judgment of the carrier as to possible delay or disadvantage to it* and not the absolute danger of proceeding.

The almost universal adoption by shipowners of Clause 4 or its equivalent has made the question of its validity under the Harter Act and Carriage of Goods by Sea Act a matter of general importance and interest in maritime trade. The apparent incompatibility of the clause and the statutes should be resolved by this Court.

POINT IV

The decision below presents a conflict between the decisions of the Ninth Circuit and those of the Second Circuit as to the extent of the review of facts on an Admiralty appeal.

In trying the issues *de novo* the Circuit Court of Appeals gave no weight to the quality of the testimony of leading witnesses who appeared in the District Court. In giving the appeal the scope of a trial *de novo* the Circuit Court of Appeals proceeded upon a selection of facts to substantiate its determination, which excluded or disregarded the findings below and the emphasis placed on them by the District Court. The Court disregarded the conclusions of the District Court as to the credibility of witnesses who sought to justify the diversion on three wholly inconsistent grounds. It moreover wholly disregarded the findings of the District Court as to the difference in risk between a voyage to Petropavlovsk and a voyage to Vladivostok and based its decision on the supposed risk of the latter.

Inter alia, the Circuit Court of Appeals dealt with the question of the damage to the cargo.

After the Court below had found that there was no proof of the seaworthiness of the vessel, a requisite of the respondent's case if it intended to claim that water had

entered through the hatches (*The Edward I. Morrison,* 153 U. S. 199, 215) the Circuit Court of Appeals *without any evidence as to the adequacy, fitness or condition of the hatch coverings or general seaworthiness at the beginning of the voyage* held that the vessel was excused from liability, making the assumption that the water entered through the hatches in stormy weather. This would be no defense in the absence of the evidence which the District Court found did not exist. The Circuit Court of Appeals therefore completely ignored the findings of the District Court which coincided with the findings of the surveyor employed by the vessel as to the cause of the damage [586-8] without any attempt to justify such procedure or to point out any errors below.

Since the adoption by this Court of Admiralty Rule 46½ requiring findings of fact and conclusions of law by the District Court in Admiralty there has been a sharp divergence in view between the Ninth Circuit and the Second Circuit with respect to the nature of an admiralty appeal. Both courts have considered the question elaborately,—the Ninth Circuit in *The Ernest H. Meyer,* 84 F. (2d) 496, 500; and the Second Circuit in *Petterson Lighterage & Towing Corp.* v. *N. Y. Central R. R. Co.,* 126 F. (2d) 992 (C. C. A. 2). They have reached differing conclusions on the question whether or not the scope of the Admiralty appeal is now analogous to that of an appeal at law or in equity as defined, in Rule 52(a) of the U. S. Civil Rules of Procedure which provides that "findings of fact shall not be set aside unless clearly erroneous."

In the present case the Circuit Court of Appeals reaffirmed and applied (p. 2138) the rule of *The Ernest H. Meyer* after the decision by the Second Circuit in the *Petterson* case and proceeded to weigh the evidence and make

its own findings of fact, both with respect to the claim for frustration and the claim for cargo damage. As to the latter the findings of the District Court [205-6] were entirely superseded.

In *The Ernest H. Meyer* the Circuit Court of Appeals for the Ninth Circuit quoted with approval as the basis of its own views the rule in *The Lucille,* 19 Wall. 73, where this Court said:

> "'An appeal in admiralty has the effect to supercede and vacate the decree from which it is taken. A new trial, completely and entirely if necessary, or, if asked for, is contemplated,—a trial in which the judgment of the court below is regarded as though it had never been rendered'" (p. 74).

The opinion proceeds as follows:

> "It is arguable that the Court" [referring to this Court in its decision in *McCrea* v. *U. S.*] "means * * * that by the promulgation of Rule 46½ requiring findings, the Supreme Court has converted the admiralty appeal into a proceeding in effect as on writ of error.
>
> * * *
>
> "* * * Until in this or some other case the Supreme Court shall clear up the doubt, we therefore adhere to the rule as stated in *The Andrea F. Luckenbach* (C. C. A.) 78 F. (2d) 827, 828, as follows: 'The well-established rule is applicable that the decision of the trial court in admiralty cases upon controverted questions of fact will not be disturbed by the appellate court unless clearly against *the weight* of the evidence'.
>
> "In so weighing the evidence it is not weighed with the end in view of determining whether a part of the evidence warrants an inference supporting

the finding. We must weigh *the whole evidence.*" (Italics those of the C. C. A. 9th Circuit.)

* * *

"In such weighing of the evidence we are required to make our independent 'examination, thought and judgment' just as did the Supreme Court in The Ariadne, 13 Wall. 475, 479, 20 L. Ed. 542, one of the last Supreme Court cases before the Act of 1875 abolishing trials de novo in admiralty appeals."

* * *

In *Petterson's Lighterage & Towing Corp.* v. *N. Y. Central Railroad Co.*, 126 F. (2d) 992 (C. C. A. 2) (1942), Judge Learned Hand said:

"We are not entirely clear that the Ninth Circuit in the Ernest H. Meyer, 84 F. (2d) 496 meant to hold that upon admiralty appeals it had a broader power than it has under Rule 52 (a), Federal Rules of Civil Procedure; but if so, we cannot agree. Much confusion has arisen, as we apprehend it, from the varying language which judges have used to describe what has now become the rubric of Rule 52 (a). As we have said, the decisions are myriad in which findings of the district court have been in fact treated as final, but the locutions have varied by which the courts have described how far they thought themselves limited. We have gathered a number of these in the appendix annexed to this opinion; and an examination of them at once shows that they differ only in form from the phrase, 'clearly erroneous,' of Rule 52 (a) * * *" (p. 995).

* * *

"* * * When therefore in 1930 the Supreme Court promulgated Rule 46½, it did no more than recog-

> nize an already thoroughly well established growth in customary law, for which it merely provided a means of better realization. It would now be as revolutionary to disregard this shift in admiralty as it would be in equity. Moreover, not much of any practical importance survives of the doctrine that an appeal in admiralty is a new trial'' (p. 996).

Both decisions recognize the desirability of a definite statement of the present law.

If practice in the Circuits is to be uniform it remains for this Court to determine whether the review on an admiralty appeal may now fairly be defined in the terms of Rule 52½ or whether the proceedings in the District Court are merely a more or less futile preliminary to the re-examination and restatement of both facts and law by the Circuit Court of Appeals.

CONCLUSION

It is respectfully submitted that a writ of certiorari should be granted to enable this Court to review the decision of the Circuit Court of Appeals.

CHARLES RECHT,
Counsel for Petitioners.

Dated: New York, N. Y., May 5th, 1943.

BURLINGHAM, VEEDER, CLARK & HUPPER,
JOHN L. GALEY,
New York, N. Y.

BOGLE, BOGLE & GATES,
EDWARD G. DOBRIN,
Seattle, Wash.
of Counsel.

(15)

JUN 4 1943
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

DOCKET No. 1017

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libelants-Appellees),

against

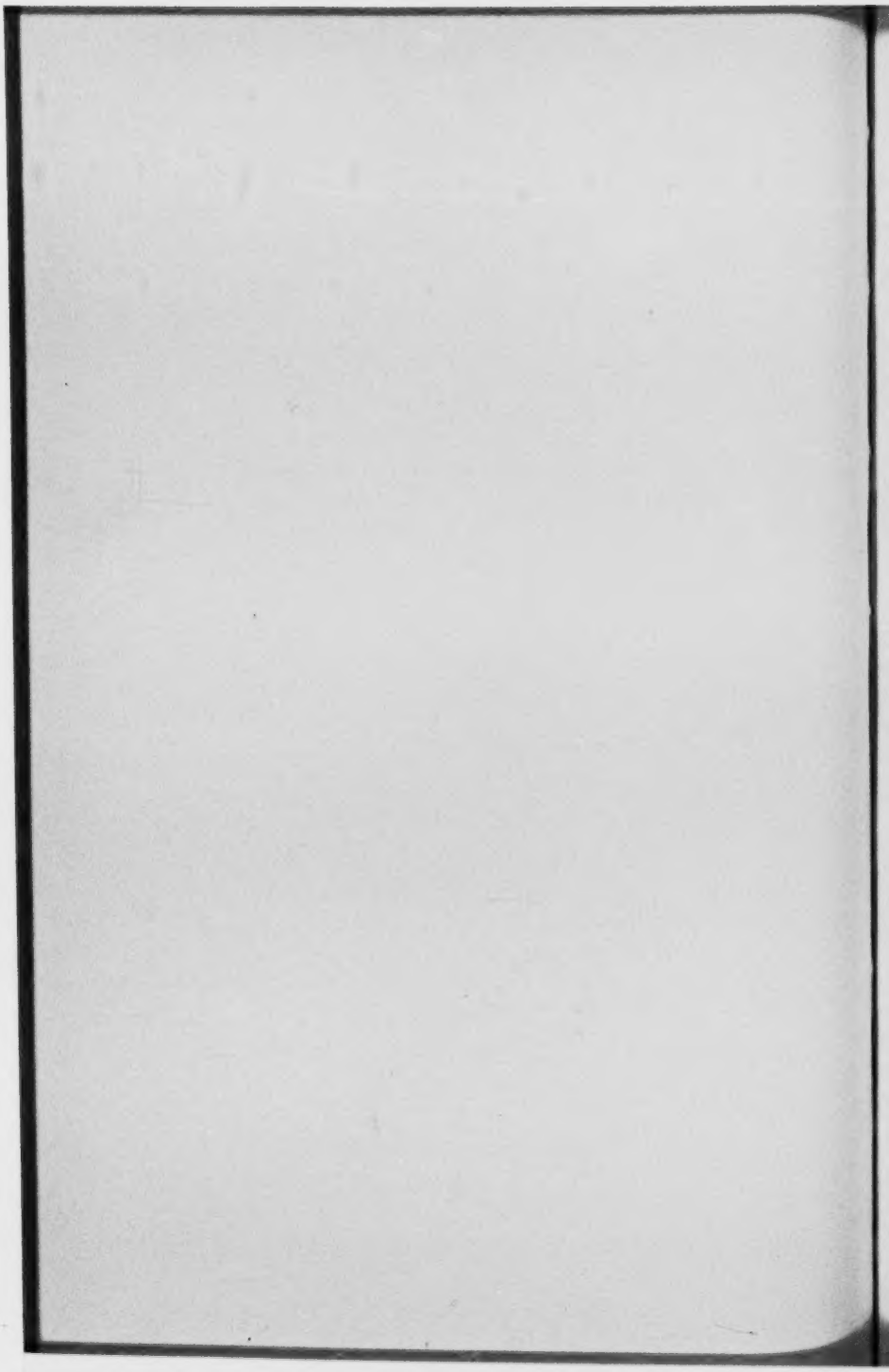
AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

Respondents-(Respondents-Appellants).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE DEFOREST LORD,
Counsel for Respondents.



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IN THE

Supreme Court of the United States

DOCKET NO. 1017

AMTORG TRADING CORPORATION, a corporation, VSESOJUZNOJE OBJEDINENIJE "STANKOIMPORT" (All-Union Combine "Stankoimport"), VSESOJUZNOJE OBJEDINENIJE "MACHINOIMPORT" (All-Union Combine "Machinoimport"), VSESOJUZNOJE OBJEDINENIJE "TECHNOPROMIMPORT" (All-Union Combine "Technopromimport"), VSESOJUZNOJE OBJEDINENIJE "RAZNOIMPORT" (All-Union Combine "Raznoimport"), and VSESOJUZNOJE OBJEDINENIJE "PROMSYRIOIMPORT" (All-Union Combine "Promsyrioimport"),

Petitioners-(Libelants-Appellees),

against

AMERICAN FOREIGN STEAMSHIP CORPORATION, a corporation, Claimant of the American Steamship WILDWOOD, Official No. 219356, her engines, boilers, tackle, apparel, furniture and consumable stores, and NATIONAL SURETY CORPORATION, a corporation,

Respondents-(Respondents-Appellants).

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The question before the Circuit Court of Appeals was whether the respondent shipowner was justified under the particular circumstances of the case in ordering its vessel to return to the United States to avoid the threat of seizure.

Respondents appealed to the Circuit Court of Appeals for the Ninth Circuit from an adverse decree by the District Court for the Western District of Washington, Northern Division. The Circuit Court of Appeals reversed upon what it held to be clearly erroneous findings of the facts by the District Court. The appellate court stated that it was unable to accept the determination of the court below "because this finding is in a large part based upon another finding of a major probative fact in determining the extent of the hazard contemplated by the Carrier and Shipper on March 18th, which latter finding has no support whatsoever in the evidence" (Rec., p. 2138). The Circuit Court found this error had been made in four places, twice in the District Judge's opinion and twice in his findings of fact (Rec., p. 2138).

The Facts

Hereafter the word "respondent" will be used to refer to American Foreign Steamship Corporation.

Respondent's S. S. "Wildwood" loaded a cargo of several thousand tons of copper and also large quantities of brass, steel sheets and airplane parts and accessories at Jersey City on February 14-19, 1940, for carriage to Vladivostok (Rec., pp. 163-164, 812, 815, 1051-1071). The cargo was shipped by Amtorg Trading Corporation and consigned to the various All-Union Combines which were also parties libelant. Contrary to the usual case, the form of bill of lading issued was not furnished by the carrier, but was supplied by Messrs. Moore-McCormack, who for nine years have been the agent of the shipper (Rec., pp. 713, 714, 718, 724-726, 1374-1378). Clause 4 thereof provided that

> "In any situation whatsoever or wheresoever occurring * * * which in the judgment of the carrier or master is likely to give rise to capture, seizure, detention, damage, delay or disadvantage to or loss of the ship or any part of her cargo, or to make it unsafe, imprudent, or unlawful for any reason to proceed on or continue the voyage or to enter or discharge

> the goods at the port of discharge, or to give rise to delay or difficulty in arriving, discharging at or leaving the port of discharge * * *"

the master may

> "proceed or return, directly or indirectly, to or stop at such other port or place whatsoever as he or the carrier may consider safe or advisable under the circumstances * * *."

The "Wildwood" sailed February 19, 1940, and after traversing the Panama Canal, proceeded toward Honolulu. On March 18, 1940, while the vessel was en route to Honolulu, libelant requested that the destination of the "Wildwood" be changed from Vladivostok to Petropavlovsk, Kamchatka, with the option (subsequently exercised, Rec., p. 396) of Vladivostok as a second port of call. Libelant requested this change of destination to be kept secret and that any revised insurance necessary be placed with United States rather than British underwriters (Rec., p. 1412).

After being assured by Amtorg's representative that the Port of Petropavlovsk was a safe and proper port (Rec., p. 1415), the change of destination was agreed upon on March 18, 1940, and confirmed in writing on March 23, 1940. The master was thereupon instructed to proceed to Petropavlovsk (Rec., p. 980, Ex. A-36).

The master and several of the officers heard radio reports from Saigon and Australia of the seizure by British naval forces of a Russian vessel, the "Mayakovsky", carrying the same type of cargo as the "Wildwood' and en route to Vladivostok (Rec., pp. 743, 744, 989, 1091, 1151, 1154). On March 27, 1940, the leading New York evening newspapers (New York Evening Sun, Post and World-Telegram) and Lowell Thomas and Elmer Davis and other radio commentators too numerous to mention reported the seizure of the Russian vessel "Mayakovsky", herself a neutral vessel bound to a neutral port (Rec., pp. 1221-1224, 1266, 1275), and most of these reports also mentioned the Russian vessel "Selenga" as having been detained by the

British for a period of two and one-half months. Almost all the comments indicated that Britain's avowed purpose was to prevent any possible leakage of copper and other metals to Germany via Russian Siberian ports (Rec., pp. 658, 670, Ex. A-1, A-3). The "Mayakovsky", under charter to Amtorg, had been seized on March 15, 1940, just three days before the change of destination was requested.

On the morning of March 28, 1940, the seizure of the "Mayakovsky" was mentioned in the New York Times, Herald Tribune and Journal of Commerce. The comments also interpreted these events as an extension of the British blockade to Russian Pacific ports (Rec., pp. 673, 676, 681, Exs. A-4, A-5, A-6).

On the morning of March 28th, Amtorg's representative went to respondent's office in response to a telephone call which stated the urgency of the situation which had arisen, and when asked why the ship had been ordered to Petropavlovsk, stated it was safer "to go further north than to go to Vladivostok on account of this blockade" (Rec., p. 1464).

Respondent's inquiries at the British and Russian Embassies and the State Department elicited no denial of the existence of the blockade (Rec., pp. 1301, 1314, 1315, 1317).

Respondent, after unsuccessfully asking for an indemnity against seizure, stated it could not further expose the "Wildwood" to seizure, capture or prolonged detention and ordered her return to the United States. It refused to have what it intended as a commercial venture turned into an attempt to run the British blockade.

It developed during the trial that the "Mayakovsky", which was then under charter to petitioner (Rec., p. 1988), had been seized March 15, 1940, three days before the request was made for a change of destination, en route from Petropavlovsk to Vladivostok, the precise route on which the "Wildwood" was requested to proceed.

The petition herein, and petitioners' brief, contain certain misstatements of the facts, which will be pointed out *infra*, and misstate, on certain points, the holding of the Circuit Court of Appeals below. It is, therefore, respect-

fully urged that this court carefully scrutinize the opinion of the Circuit Court of Appeals below, with this fact in mind.

There is no support whatsoever in the record for the statement on page 5 of the petition herein that "the master abandoned the voyage supposing he had been ordered to do so because of ice conditions at Petropavlovsk". No reference to the record is cited in support of this and it is not in fact true. The fact is that, while the master acted on the owner's orders, as in *The Styria* v. *Morgan* (186 U. S. 1, 19, 20), he did so in entire agreement therewith and in conformity with his own independent judgment as to the risk of seizure, as well (Rec., pp. 279-280; 989. See also p. 113 of original deposition of Captain Arntz).

Various further subsidiary questions of fact are raised by the petitioners which we shall here consider briefly, although as will appear, differences on such matters of fact afford no basis for the granting of the writ herein. Thus, on page 6, the petition suggests there never was a threat to United States vessels. However, the threat related to seizure of cargoes of metals and made no distinction as to the bottoms in which they were carried. None of the reports upon which respondent acted contained the suggestion of any such distinction, and the British Foreign Secretary, on March 27, 1940, expressly declared that no distinction was being made between Russian ships and ships of "all other neutrals" (N. Y. Times, March 28, 1940; Ex. 56, Rec. pp. 678-679). It would have been an extraordinary blockade, indeed, which contemplated permitting the passage of cargoes of metals if carried in American bottoms. The British Government did not hesitate to seize American vessels in other war areas. In fact, no less than 108 United States vessels had been seized in the Atlantic and Mediterranean by Great Britain between September 1, 1939, and March 15, 1940 (U. S. Dept. of State Bulletin, Vol. 2, p. 320).

Similarly, on page 7 of the petition, it is stated that the British blockade of Germany had been announced on September 5, 1939. This statement seeks to convey the impression that the blockade of Russian Pacific ports existed

almost from the outbreak of the war. However, on February 27, 1940, Ronald Cross, the British Minister for Economic Warfare, announced emphatically "there was no control in the Pacific" (Ex. 72, not printed, Journal of Commerce, Feb. 28, 1940).

Similarly, the petitioners refer (p. 4) to the interception by the British for "contraband inspection" of the Russian vessel "Selenga" on January 14, 1940. The seizure of this vessel, however, was merely an isolated incident arising from a special cause, and the presence on board of German-owned materials, and in no way involved any danger to a ship in the situation of the "Wildwood", as will be seen from the very full discussion of this incident in the opinion of the Circuit Court below (Rec., pp. 2141-2143).

POINT I

No substantial question of law is here presented, but solely questions of fact, which afford no ground for review by certiorari.

It is well settled that where the question involved is primarily one of fact, there is no basis for granting the petition (*Southern Power Company* v. *North Carolina Public Service Commission* (1923), 263 U. S. 508). As the court said, in *General Talking Pictures Corporation* v. *Western Electric Co.* (1938), 304 U. S. 175, at page 178:

> "Granting of the writ would not be warranted merely to review the evidence or the inferences drawn from it."

In the present case, no substantial question is presented except such issues of fact. There has been substantial agreement between both the District Court, the Circuit Court, and counsel for both petitioners and respondent as to the proper test of respondent's liability. This is, in brief, that respondent was justified in turning back the "Wildwood" if the Carrier had reasonable grounds for apprehending a serious danger, substantially greater than

had theretofore existed. Thus, the District Court laid down as its guiding rule: "The claimant cannot justify frustrating the voyage agreement because threatened blockade of Vladivostok by the belligerent unless there were increased hazards to shipping than existed at the inception of the voyage to such a degree as would move reasonably prudent men" (Rec., p. 149). The petitioners (appellees below) similarly declared in their brief (p. 34): "It is incumbent upon appellant (respondent here) to show not only that there were changed conditions, but that such changed conditions were such as to create a reasonable belief that if the voyage were not abandoned the vessel and cargo were in imminent peril of loss or damage." Similarly, the Circuit Court below rested its decision upon the existence of a "reasonable apprehension of a real danger of seizure", constituting "a far greater war hazard" (Rec., p. 2148). And with these views, respondent has been throughout in agreement.

The decision of the Circuit Court herein and the governing rule adverted to above are based both upon the general maritime law and upon Clause 4 of the bill of lading herein (*supra*, pp. 2-3). The petitioners' brief, however, questions whether the doctrine of the *Kronprinzessin Cecilie* and *The Styria* cases applies to the situation in the present case. The argument apparently is that the doctrine of these cases only applies where war has broken out, and where the vessel is proceeding to a belligerent port. This position, however, is without support in the cases cited. The doctrine was not based upon the existence or the nonexistence of war, but upon the existence of changed conditions involving substantially increased hazard. The problem remains the same whether shipment is through a neutral country or direct to a belligerent port, or whether war had already broken out or not when the vessel sailed (*The Kronprinzessin Cecilie*, 244 U. S. 12; *The Styria* v. *Morgan*, 186 U. S. 1; *Nobel's Explosives Co.* v. *Jenkins* [1896] 2 Q. B. 326, 8 Aspinall (N. S.) 181; *Tatsuuma Kisen Kabushiki Kaisha* v. *Robert Dollar Co.*, 31 F. (2d) 401, 403; *The George J. Goulandris*, 36 F. Supp. 827; *Atlantic Fruit Co.* v. *Solari*,

238 Fed. 217; *The San Giuseppe,* 122 F. (2d) 579, 586; *Essex* v. *Langbehn,* 250 Fed. 98). In the present case, the institution of contraband control in the Pacific by the British and the seizure of the "Mayakovsky" on the very voyage which the petitioners maintain the shipowner should have pursued, brought respondent squarely within these rules.

Petitioners contend (p. 13) that the master must participate in the decision to return and the owner alone possesses no discretion to order the vessel's return. This has no support in the decisions. Two citations are sufficient. In *The Styria,* the master testified flatly that "he acted under instructions" (186 U. S. at pp. 19, 20). In *The Kronprinzessin Cecilie,* the view that the master must participate in the decision was adopted by the Circuit Court (238 Fed. 668) but repudiated by the Supreme Court (244 U. S. 12). In that case, the master ordered the return of the vessel within nine minutes after receiving the owner's instructions (238 Fed. at p. 671). In both cases, the shipowner and vessel were excused. Historically, the only reason for vesting the discretion in the master was that before the improved modern systems of communication he was out of touch with the owners from the moment his vessel sailed beyond the horizon.

Finally, petitioners argue that, in any event, the Carrier should have proceeded to Petropavlovsk (Pet., p. 14; Pet. Br., Point II), as an alternative still open without hazard to the Carrier. This argument is postulated upon the assumption that no substantial risk attended the progress of the "Wildwood" to Petropavlovsk, and petitioners assert that no finding has been made by the Circuit Court on this point. The assumption that there was no risk, and the assertion that there was no finding, are both contrary to fact. The various reports upon which the Carrier relied referred to blockade or "contraband control", not only of Vladivostok, but of "*Russian-Siberian* ports", and the Circuit Court specifically so states (Rec., p. 2147). Furthermore, the Circuit Court likewise specifically declared that, under the circumstances, "no conclusion could reasonably be reached by the Carrier or any other person

similarly placed, save that the *further progress of the Wildwood* * * * *toward* its ports of destination was fraught with serious risk" (Rec., p. 2147). If it "could not *proceed* * * * *toward* its *ports* of destination" without "serious risk", it is obvious that the ship had, at that time, already reached a zone of serious danger, irrespective of whether it completed the voyage to Vladivostok, or attempted to reach Petropavlovsk unmolested. Finally, the Circuit Court specifically declared (Rec., p. 2148) that "We held that * * * the carrier had a reasonable apprehension of a real danger of the seizure of the Wildwood by the British naval vessels on her voyage to Vladivostok *via Petropavlovsk*", and that "the danger so reasonably apprehended was a *far greater* war hazard" than had hitherto existed.

While this court does not sit to review questions of fact, as stated, or grant certiorari upon such grounds, it may be pointed out that the Circuit Court was clearly correct in these specific findings. The "Wildwood's" course was no secret from the British, for London insurance agents had been notified a week previously of the deviation to Petropavlovsk (Rec., pp. 1550-1552), and the cables between the master and the owner had been sent *en clair* (Rec., pp. 978-980, 991, 994). It thus appears that if the British wished to seize the vessel, they could as readily intercept her en route to Petropavlovsk as to Vladivostok.

It is apparent from the foregoing that the only substantial questions raised by the petition involve disagreements with respect to subsidiary questions of fact, and that no controversy as to the basic test to be applied and the dominating rule of law here involved is necessary to the decision of this case. The undisputed rule is, to repeat, that respondent was entitled to return the "Wildwood", if confronted with a reasonable apprehension of a real danger, substantially greater than had existed when the obligation was assumed. This test is likewise the governing consideration in the construction and application of Clause 4 of the bill of lading, with the broad powers therein conferred (*Cf. Quina Export Co.* v. *Seebold* (C. C. A. 5th), 287 Fed. 626; *The Blandon,* 287 Fed. 722, 727; *Israel* vs. *Luckenbach*

S. S. Co., 6 F. (2) 996; *Atlantic Fruit Co.* v. *Solari*, 238 Fed. 217); and this is the test which has been applied by the Circuit Court of Appeals below. There is no basis whatsoever for the suggestion in petitioners' brief (p. 27) that the Circuit Court of Appeals, in its decision, "goes to the length of holding that *any appreciable or imaginary aggravation of risk* occurring during the course of a voyage justifies its abandonment." The Carrier here was not confronted with merely an imaginary aggravation of risk. As the Circuit Court of Appeals specifically held (Rec., p. 2147), these reports "were not mere fanciful and unfounded rumors, but the natural and world-wide interpretation of admitted facts by persons who were experts on foreign affairs. It would have been foolhardy for the Carrier to set up its judgment in opposition to facts stated by the press and the most experienced radio and news commentators of the day who appear to have been convinced that the seizure of the *Mayakovsky* meant 'blockade' or strict contraband control of Russian Siberian ports." Indeed, the United States Department of State itself, through Secretary Hull and Under Secretary Welles, were reported as in sympathy and cooperating with this newly instituted British policy of blockade or "contraband control" in the Pacific (Resp. Ex. A-73, not printed). The Circuit Court of Appeals specifically based its decision, as already stated, on the ground that "no conclusion could reasonably be reached by Carrier, or any other person similarly placed, save that the further progress of the Wildwood with its cargo of metals, similar to those on the seized vessel, towards its ports of destination, was fraught with *serious risk*"; and that "the Carrier had a *reasonable apprehension of a real danger* of the seizure of the Wildwood by the British naval vessels on a voyage to Vladivostok *via Petropavlovsk*"; and that this danger was "a far greater war hazard" than that theretofore existing (Rec., pp. 2147, 2148, ital. ours). It is understandable enough that petitioners should disagree with these conclusions; but no amount of disagreement can change the nature of the test adopted and applied by the Circuit Court, or convert the question of fact therein involved into one of law.

POINT II

The contention that certiorari should be granted on the ground that Clause 4 of the Bill of Lading herein is invalid under the provisions of the Harter Act and the Carriage of Goods by Sea Act, is without merit.

In an attempt to escape from the effect of Clause 4 of the Bill of Lading herein, which, in itself, furnishes complete authority for the action of the Carrier and the decision of the Circuit Court, petitioners suggest that this clause is invalid under the Harter Act and the Carriage of Goods by Sea Act (Pet. Br., pp. 15, 16, 33-34). It is apparent that this suggestion is merely an attempt, without substance, to bolster up the request for certiorari. No such claim of invalidity under the Carriage of Goods by Sea Act, or the Harter Act, was raised, or even hinted at, by petitioners, at the trial of this case, or in the briefs or argument before the Circuit Court. Nor was there the slightest intimation of any such question in the case in the opinion of the District Court, or of the Circuit Court, or in any of the pleadings. Even petitioners' present brief avoids squarely asserting or adopting such an unfounded view, and merely "raises the question", in a tentative and ambiguous manner.

It is well settled that this court will not, save in very exceptional circumstances, here review questions that were not raised below. As the court declared (per STONE, *J.*) in *Duignan* v. *United States* (274 U. S. 195, 200): "This court sits as a court of review. It is only in exceptional cases coming here from the Federal courts that questions not pressed or passed upon below are reviewed" (citing many cases; see, to same effect, *Blair* v. *Oesterlin Co.*, 275 U. S. 220, 225; *Burnet* v. *Commonwealth Improvement Co.*, 287 U. S. 415, 418; *N. Y. Dock Co.* v. *S. S. Poznan*, 274 U. S. 117, 123; *Adams* v *Mills*, 286 U. S. 397; *Minnich* v. *Gardner*, 292 U. S. 48).

In the present case, there are no "exceptional circumstances", or sudden emergencies, whatsoever that call for the abandonment of the above rule and the elimination of a considered judgment upon the issue by the court below. On the contrary, the suggestion of invalidity of Clause 4 rests upon statutory language enacted in 1893, which has been construed and applied in innumerable cases for over half a century, without the validity of clauses of this nature in the bill of lading ever being successfully questioned on the grounds now so belatedly sought to be injected into this case. No one, in all that time, ever supposed the statute had the meaning or effect that petitioners, after half a century, now suggest, although clauses of the same nature as Clause 4 herein have been repeatedly before the courts.

Moreover, the suggestion of invalidity, raised after half a century of active contrary interpretation, is patently without substance on the merits. The suggestion is, that the Harter Act (enacted in 1893) makes null and void any provision in the bill of lading which relieves the owner from liability for "proper delivery" of the cargo (46 U. S. C. A., secs. 190, 191); and that, for this reason, Clause 4, conferring authority on the Carrier to discontinue the voyage when a situation arises likely to give rise to capture, seizure, detention, damage, delay, etc., is, or may be, void. The mere general requirement, however, that the Carrier may not contract away the obligation to "properly deliver" the cargo, does not in any way conflict with such a clause. The phrase "proper delivery" obviously did not impose an iron-clad obligation to attempt completion of the voyage, irrespective of whatever dangers might arise, but left ample scope for reasonable contractual provisions with respect thereto. What is, or is not, "proper" must depend upon the circumstances and the agreement of the parties. Were this not so, practically all of the bills of lading issued since 1893 would have to be adjudged to have been invalid, for some clause of this nature has been in almost universal use. Numerous cases have likewise sustained so-called "liberty to call" clauses, conferring latitude as to the course of the vessel within the limits of "inherent rea-

sonableness'' (*The Hindanger,* 76 F. (2d) 13, 17; and cases there cited); and it was expressly held that such contractual provisions, if reasonable, were not in conflict with the Harter Act. In case after case, moreover, this court has refused certiorari to review such holdings.

W. R. Grace & Co. v. *Toyo Kisen Fabushika Kaisha* (D. C. Cal., 1925), 7 F. (2d) 889; *aff'd,* 12 F. (2d) 519; *cert. den.,* 273 U. S. 717;

Smith v. *U. S. Shipping Board E. F. Corp.* (D. C., N. Y., 1924), 2 F. (2d) 390; *mod. on another point,* 26 F. (2d) 337; *cert. den.,* 273 U. S. 747;

Israel v. *Luckenbach S. S. Co.* (C. C. A. 2, 1925), 6 F. (2d) 996; *cert. den.,* 268 U. S. 691;

Luckenbach S. S. Co. v. *W. R. Grace & Co.* (C. C. A. 4, 1920), 267 Fed. 676; *cert. den.,* 254 U. S. 644.

In the instant case, the Circuit Court of Appeals has pointed out that both parties agree that the discretion conferred upon the Carrier by Clause 4 of the bill of lading may not be exercised in an arbitrary and unreasonable manner. The Carrier has not and does not now contend otherwise.

The facts amply sustain the holding of the Circuit Court of Appeals that the act of the ship in returning to this country was, under the circumstances, reasonable. This court should not now consider the question of whether this clause of the bill of lading would permit the ship to act unreasonably. On this record, such a question would be entirely academic. The Carrier, as the Circuit Court has declared, did not order the vessel to return until a situation arose where ''no conclusion could reasonably be reached by the Carrier, or any other persons similarly placed, save that further progress of the Wildwood * * * towards its ports of destination, was fraught with serious risk'' (Rec., p. 2147). Under such circumstances, reference to the statutory duty of ''proper delivery'' is idle and trivial.

The Carriage of Goods by Sea Act (1936) likewise provides (46 U. S. C. A., sec. 1303) that any clause ''reliev-

ing the carrier or the ship from liability for loss or damage * * * arising from * * * *failure in the duties and obligations provided in this section* or lessening such liability", shall be null and void; but the only "duty and obligation", provided in the section, here relevant, is that "the carrier shall properly * * * carry * * * and discharge * * * the goods carried". This obligation, to "properly discharge" the goods carried, is, it will be seen, merely a restatement, in almost identical terms, of the general obligation of "proper delivery" contained in the Harter Act, considered above, and raises no new question.

No reason exists, after fifty years of universal contrary practical construction, why certiorari should be granted on any such pretended conflict between clause 4 and the statutes in question.

POINT III

No conflict between decisions of the Ninth and Second Circuits as to the scope of review of questions of fact is involved in the present case.

Petitioners' brief (p. 35, ff.) conjures up a conflict of opinion between the Ninth Circuit and the Second Circuit with respect to the nature of an admiralty appeal, the Ninth Circuit taking the view that such an appeal is a trial *de novo,* whereas, in the Second Circuit this view has been dissented from (*Petterson's Lighterage & Towing Corp.* v. *N. Y. Central Railroad Company,* 126 F. (2d) 992). Whether the view of the Ninth Circuit be adopted or whether the views of Judge HAND in the *Petterson* case, *supra,* be followed is, however, quite immaterial as, under either doctrine, the Circuit Court below clearly had power in the instant case to make the determination here sought to be reviewed. For it is well settled, and clearly recognized in the *Petterson* case itself that, wholly aside from the ques-

tion of trial *de novo* in admiralty cases, the Circuit Court of Appeals is empowered to reverse findings which are "clearly erroneous", which exhibit "manifest error", or which are clearly against the preponderance of the evidence.

In the present case, the Circuit Court below, although according "respect to the findings of the district court" (Rec., p. 2138), based its decision upon the ground that the fundamental findings of fact by the District Court were wholly erroneous and, as to various basic and crucial questions, had "no support whatsoever in the evidence" (Rec., p. 2138). The whole issue in the case rested upon the question whether there was a reasonable apprehension of substantially increased hazard, at the time the "Wildwood" turned back. In this connection, the trial court held: (1) that prior to the date of turning back, the respondent already had notice and contemplated an existing blockade; and (2) that the events of March 27-28, 1940 (surrounding the seizure of the "Mayakovsky") resulted in no increase in hazard. The Circuit Court of Appeals, however, found itself utterly "unable to accept the court's finding" in these connections (Rec., p. 2138). As to the finding that, even prior to the time of turning back, respondent already had notice of the blockade, the Circuit Court declared that this finding "has *no support whatsoever* in the evidence" (Rec., p. 2138), and that "*there is no evidence* that the parties contemplated an existing blockade of that port at any time prior to the abandonment of the voyage" (Rec., p. 2139). The error of the trial court, it pointed out, was due to the fact that "in four places, two in his opinion and two in his findings of fact, the venerable District Judge * * * mistook a later conversation concerning a blockade of Vladivostok, occurring on March 28th, after the Carrier learned on the day before of the seizure of the Mayakovsky, as having occurred ten days earlier, on March 18th * * *" (Rec., pp. 2138-2139).

As the Circuit Court further pointed out, this wholly erroneous and completely unfounded belief of the District Court concerned "a major probative fact, in determining

the extent of the hazard contemplated by the carrier and shipper", and "An error so grave is such a patent factor in the District Court's decision, that we cannot say that the decision would have been made for the *shipper* if the court had realized that there was no evidence that the *carrier* had agreed to carry to a blockaded port" (Rec., pp. 2138, 2139).

As to the basic finding of the trial court that there was "no increased hazard" (Rec., pp. 150, 204), the conclusion of the Circuit Court of Appeals was, in effect, that this was clearly contrary to the evidence. As the Circuit Court declared (Rec., p. 2147): "Under these circumstances *no conclusion could reasonably be reached by Carrier, or any other persons similarly placed,* save that the further progress of the Wildwood, with its cargo of metals, similar to those on the seized vessel, towards its ports of destination, was fraught with serious risk." The above language, that no other conclusion could reasonably be reached under the evidence, clearly brings the case within the well-established rule, irrespective of any question of trial *de novo.*

Moreover, it should be noted that the findings in the present case, which were disaffirmed, were largely based upon the court's view of undisputed documentary evidence, such as newspaper reports and the like, and radio news broadcasts, as to which there is no question of credibility, and upon depositions. It is well settled, and impliedly recognized by Judge HAND himself in the *Petterson* case, *supra,* (at pages 994, 996) that under such circumstances the findings of the trial court stand upon a different footing; inasmuch as the court below was in no better position to judge of the effect of such testimony than the Circuit Court, they are of only slight weight upon appeal (*United States* v. *Mitchell,* 104 F. (2d) 343, 346; *Kuhn* v. *Princess Lida of Thurn & Taxis,* 119 F. (2d) 704, 706; *Himmel Bros.* v. *Serrick Corp.,* 122 F. (2d) 740).

The above considerations dispose likewise of the minor question of cargo damage in the present case. The issue on this branch of the case was solely one of fact, *i. e.,* whether the water entered the hold through the hatches or through

the chain locker, and the Circuit Court rested its decision in this respect squarely upon the ground that the uncontradicted evidence was contrary to the finding of the trial court (Rec., pp. 2149-2150).

It thus appears that if the decision below were to be governed by the rule of the *Petterson* case, the court would not have arrived at a different conclusion, since its reversal was based on the clearly erroneous findings of fact of the District Court. Consequently, even if there were a conflict between the Circuit Courts of Appeal for the Second and Ninth Circuits—a question which it is not necessary here to decide—a review of this case would not resolve that conflict.

The petition for a writ of certiorari should accordingly be denied.

GEORGE DEFOREST LORD,
Counsel for Respondents.

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